STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

COUNCIL 40, AFSCME, AFL-CIO, Complainant, vs. MARINETTE SCHOOL DISTRICT, Respondent.	:	Case XVIII No. 29496 MP-1318 Decision No. 19542-A

ORDER DENYING MOTION TO OPEN THE RECORD
TO TAKE NEW EVIDENCE

Complainant filed a complaint with the Wisconsin Employment Relations Commission alleging that Respondent had committed prohibited practices within the meaning of Section 111.70(3)(a) of the Municipal Employment Relations Act. The Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner. Hearing on the complaint was held on August 5 and 6, and October 18, 1982. Briefs and reply briefs were filed by the parties, the last of which were exchanged on March 1, 1983. On April 22, 1983, prior to the Examiner's issuing a decision in the matter, Complainant filed a motion to reopen the record for the purpose of receiving new evidence. A hearing on said motion was held in Marinette, Wisconsin on May 4, 1983. The Respondent opposes the motion. The Examiner has considered the matter and issues the following

ORDER

IT IS ORDERED that the Motion to Open the Record to Take New Evidence is denied.

Dated at Madison, Wisconsin this 27th day of May, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTION TO OPEN THE RECORD
TO TAKE NEW EVIDENCE

Wis. Adm. Code Section ERB 10.19 provides that a "hearing may be reopened on good cause shown." The standards for reopening a hearing were set forth in Gehl Company, (9474-G) 5/71, and require the movant to show:

> (a) That the evidence is newly discovered after the hearing, (b) that there was no negligence in seeking to discover such evidence, (c) that the newly discovered evidence is material to that issue, (d) that the newly discovered evidence is not cumulative, (e) that it is reasonably possible that the newly discovered evidence will affect the disposition of the proceeding and (f) that the newly discovered evidence is not being introduced solely for the purpose of impeaching witnesses.

The Complainant desires to reopen the record in this hearing to offer evidence of the District's conduct following the Complainant's filing of a mediation-arbitration petition with respect to the parties' negotiations for a successor agreement. The parties held a negotiation session on June 21, 1982 where impasse was discussed. Thereafter, on August 5, 1982, the Complainant petitioned for mediation-arbitration. The Complainant argues that the Respondent's conduct thereafter is relevant to the pre-petition conduct of the Respondent as it is evidence of what is a reasonable period of time to meet in negotiations and evidence as to the Respondent's refusal to negotiate or reach an agreement on the issue of contracting out custodial services.

After considering the Complainant's motion in light of the above standards, the Examiner denies the motion because it is not reasonably possible that this evidence will affect the outcome of the proceeding.

First, once the parties have invoked the procedures set forth in Section 111.70(4)(cm)6, the investigator has the discretion and authority to determine when to require the parties to exchange final offers and to determine if additional time might result in resolution of differences. As stated in Waukesha County, (16515) 8/78:

> The extent to which requests for delays for further 'base touching' by a party will be accommodated during the investigation is a matter within the judgment of the investigator, based on his or her assessment of the reasonableness of the request in all of the circumstances, and of whether the resultant delay may or may not contribute to the settlement or narrowing of the issues in dispute.

Hence, the conduct of a party is controlled by the investigator and such conduct is not relevant to pre-petition conduct.

Secondly, the parties were arguably at impasse at the time of the filing of the petition for mediation-arbitration. A significant incident of impasse is that either party is free, after impasse is reached, to decline to negotiate further. Impasse means that the parties have exhausted negotiation efforts, and any subsequent action consistent with that, does not evidence a prior mindset against reaching agreement. See Cheney Lumber Co. v. NLRB, 319 F. 2d 375, 53 LRRM 2598 (9th Cir., 1963).

Thirdly, certain delays were due to the filing of a declaratory ruling petition by the Respondent on a proposal included in Complainant's final offer. Section 111.70(4)(cm)6.g. provides that the mediation-arbitration proceedings shall be delayed until the Commission renders the declaratory ruling decision. The delay caused by the filing of a petition for a declaratory ruling, pursuant to the above-cited statute, does not tend to prove improper negotiating conduct on the part of the Respondent, particularly where the dispute involves a proposal included in a final offer.

Fourth, the dispute between the parties after June 21, 1982 involved the terms of a successor agreement, whereas the complaint in the matter before the Examiner involved a bargaining dispute which arose during the term of the contract to which Section 111.70(4)(cm)6. is not applicable. While the Complainant contends otherwise, the Examiner finds that the disputes are separate and distinct, and conduct related to one dispute is not necessarily applicable to the other.

Therefore, for these reasons, the Examiner has denied Complainant's Motion to Open the Hearing to Take New Evidence.

Dated at Madison, Wisconsin this 27th day of May, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner